United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

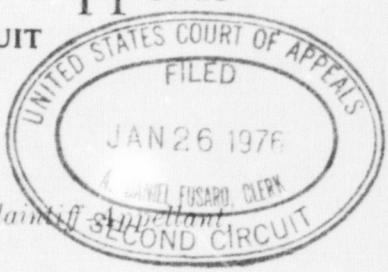
ORIGINAL

75-7476

To be argued by
EDWIN K. REID

United States Court of Appeals

FOR THE SECOND CIRCUIT



ANTONIO NAPOLI,

Plaintiff-Appellant,

against

[TRANSPACIFIC CARRIERS CORP. and
UNIVERSAL CARGO CARRIERS, INC.]
HELLENIC LINES, LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

ZOCK, PETRIE, REID, CURTIN & BYRNES
Attorneys for Defendant-Appellee
19 Rector Street
New York, New York 10006

EDWIN K. REID
of Counsel

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Issues

The issues stated by the plaintiff are:

1. In charging the jury that if plaintiff or his stevedore-employer or his co-employees knew or should have known of the dangerous condition complained of, there could be no negligence on shipowner's part.

2. In refusing to charge the jury that concurrent negligence by shipowner and stevedore-employer does not relieve the shipowner from liability.

The defendant, shipowner, does not agree with the issues as stated by the plaintiff. The shipowner's statement of the issues are:

> Where the Lower Court charged the jury that the defendant shipowner had a continuing obligation to

furnish plaintiff a safe place to work and the jury found that plaintiff did not sustain his burden of proof that the shipowner was negligent, did the Court commit reversible error

1) in also charging the jury that if plaintiff or his stevedore-employer or his co-employer knew or should have known of the dangerous condition complained of, there could be no negligence on the shipowner's part and

2) in refusing to charge the jury that concurrent negligence by shipowner and stevedore-employer does not relieve the shipowner from liability.

Statement of the Case

Appellant, plaintiff below, appeals from the judgment dated July 31, 1975 after a jury trial before the Honorable Robert J. Ward, D.J., United States District Court for the Southern District of New York, whereat the plaintiff's complaint was dismissed after a jury found no negligence on the part of the defendant causing plaintiff's accident and injuries allegedly sustained during his employment as a longshoreman aboard the S/S HELLENIC DESTINY.

The plaintiff's action is brought under the Longshoremen's & Harbor Workers' Compensation Act (Act) as amended, effective November 26, 1972, 33 U.S.C.A. 901 *et seq.*, 86 Stat. 1251 (1972).

Facts

On January 9, 1974, the plaintiff was in the employ of the defendant, Hellenic Lines Limited (Hellenic), as a longshore gangwayman to discharge cargo in the No. 5 hatch (11a) of the HELLENIC DESTINY bareboat chartered to Hellenic (pro hac vice owner). Hellenic acted as its own stevedore.

There were drums of cargo stowed on the inshore side of the vessel from the forward part of No. 4 hatch to the after part of No. 5 hatch between the hatch coaming and the ship's rail (25a, 203a, 204a). The vessel was at the pier at the foot of 59th Street in Brooklyn discharging cargo. Plaintiff had previously worked on the vessel three days before his accident (8a).

Plaintiff boarded the vessel at 8:00 a.m., January 9, 1974 (7a), but did not turn to until around 11:00 a.m. when snow, which had been falling since early morning (10a), had ceased to fall (11a). The plaintiff was a member of Frank Battista's gang, the hatch boss at No. 5 hatch (5a). The winchman, a co-worker, was Salvatore Mignano. The stevedore ship foreman was aboard (50a).

Mr. Battista took his orders from the stevedore ship foreman and in turn gave orders to his gang (57a, 85a, 86a). No orders were given by the ship to plaintiff (47a, 52a) or to Mr. Battista in regard to the work to be performed by the No. 5 gang, the time of the performance of the work, or the manner or method in which the work was to be performed (85a, 86a). From the time the No. 5 gang boarded the vessel up until the time of the plaintiff's accident and thereafter, none of the ship's officers were on the deck at or in the vicinity of the No. 5 hatch (47a, 52a). There is no evidence that the ship's officers gave the stevedore ship foreman any orders (86a).

When plaintiff reached the No. 5 hatch he noticed that there was two pieces of 4′ x 8′ plywood, one next to the other fore and aft (22a, 23a), on top of the drums. The plywood extended from the after end of the No. 5 hatch to a point less than midway of the No. 5 hatch. The plywood was between the hatch coaming and the ship's rail (23a-26a, 203a). That was the only plywood in the vicinity of the place where plaintiff was working (23a, 24a, 203a). After the aft end of No. 5 hatch and the drums was the after house which afforded an unobstructed space to the

ship's rail where plaintiff could have worked (38a). There was also the after house deck where plaintiff could have worked (203a, 204a, 26a, 40a). There is no evidence that it was customary for gangwaymen to work on top of deck loads (13a, 117a). Plaintiff did not know how much snow was on top of the plywood (47a). The plywood was not fastened or secured to the drums.

Plaintiff's job was to signal the winchman when to lift the cargo out of the No. 5 hatch and to stop lowering it as it reached the dock (7a).

The winches were on a platform raised approximately 9′ off the deck and were between the No. 4 and No. 5 hatches (27a). The winchman can look down into the hatch and see where the holdmen are working (28a).

Plaintiff chose to stand on top of the plywood. After several drafts of cargo had been discharged (16a), the plaintiff slipped. The evidence is conflicting as to whether he slipped on the plywood or the plywood slipped on the drums and caused him to fall (16a, 202a). There were no actual eyewitnesses to the accident (51a, 52a). Plaintiff made no report of the accident to the vessel (52a).

Prior to the accident, plaintiff did not brush or shake the snow off the plywood or make any effort to secure it (49a). He did not complain to the hatch boss about his place of work (49a) or ask for any sand (55a).

The plaintiff did not know who put the plywood on top of the drums or how long it had been there (20a). The evidence on this point is in conflict.

Mr. Battista in a signed statement dated November 25, 1975 stated that the plaintiff "slipped on a piece of plywood which he (plaintiff) laid down as a walkway in order to give signals to the winchman. The plywood was placed on top of metal drums which were covered with snow and the plywood also got covered with snow" (85a). At the trial, Mr. Battista testified that the vessel's crew took the

plywood, they shake the snow off the plywood and then put it back on the drums and made a path from No. 4 to No. 5 hatches (76a).

Mr. Mignano, the winchman, gave a statement dated November 22, 1974 in which he stated that plaintiff "slipped on the plywood which we laid down on the metal drums . . . (145a). At the trial, Mr. Mignano denied that he stated that we put the plywood down. He stated that the plywood was already down (146a). He did not state who put it down. He further testified that he saw plaintiff standing on top of the drums while working, but he did not know if there was plywood on top of the drums (118a). There was snow on top of the drums (118a). He did not actually see plaintiff fall. Mr. Mignano was on the winch platform working the winches (126a).

The Lower Court's Charge to the Jury

The Lower Court's Charge Re The Shipowner's Negligence and The Jury's Finding of No Negligence: Background.

The plaintiff longshoreman has not appealed from the Lower Court's charge to the jury in regard to the shipowner's negligence and the jury's finding of no negligence.

As a background to the plaintiff's claim of reversible errors with respect to other charges, it is apropos to discuss the court's charge relating to shipowner's negligence, the facts and the jury's finding of no negligence.

The Court below charged that the vessel owed the plaintiff a continuing duty to furnish plaintiff with a safe place to work (162a-163a). The vessel excepted to that charge. The Court granted the exception (180a).

The concept of a continuing duty is subject to the construction that the owners owed plaintiff a non-delegable duty to furnish plaintiff a safe place to work. The Act

and the cases reviewing the Congressional Committee Reports have held that the Act abolished the concept of unseaworthiness and non-delegable duty to furnish a safe place to work. This is pointed out below at page 9.

On the other hand, the charge taken as a whole deals with the concept of negligence and the requirement of notice. Under this construction of the charge and the conflicting facts and credibility of witnesses, the jury properly found that plaintiff failed to prove negligence of owners.

The plaintiff longshoreman was an employee of the stevedore. The defendant was the vessel owner pro hac vice and was its own stevedore. The shipowner turned over the vessel and plaintiff's place of work to the stevedore for discharge of cargo. Mr. Battista, plaintiff's intermediate boss, took his orders from the stevedore ship foreman and in turn gave orders to plaintiff.

The stevedore took possession and control of the vessel and plaintiff's place of work. The hatch boss was aware of the snow on top of the drums. In contradiction of plaintiff, the jury could have found that the hatch boss saw plaintiff put the plywood boards, unsecured, on top of the drums as a place of work, or the jury could have accepted Mr. Mignano, the winchman's testimony, that "we laid down the plywood on top of the metal drums" and thus the jury could have found that to the knowledge of plaintiff, the winchman, and the hatch boss, the plaintiff or the stevedore created an unsafe place to work which was obviously unsafe.

In the alternative, the jury could have found that plaintiff was solely at fault. He could have performed his work from two safe places of work, the after end of the No. 5 hatch and ship rail unobstructed by the drums, or by standing by the rail on the after house or that before working on the plywood, plaintiff should have examined it and that at the very least brushed it off or shaken it off

so that it would be safe to stand on. In any event, plaintiff made no complaint to the hatch boss about his place of work. There is also a further alternative. The jury may have disbelieved plaintiff's story. There were no actual eyewitnesses to the accident.

There is no evidence that the vessel directed the stevedore to commence work at any particular time. The hatch boss took his orders from the stevedore ship foreman. There is no evidence that any ship's officers were around the decks at anytime before plaintiff's accident, much less giving orders or had knowledge of the place and condition of the place where plaintiff was working or had knowledge as to who created the condition and how long it had existed or that plaintiff would work on a plywood platform. The jury could have disbelieved the hatch boss' testimony that the plywood was placed on the drums by the vessel's crew; that they cleared a path of snow off the drums and shook the snow off the plywood before putting it back.

In the circumstances, it is easy to understand why plaintiff did not except to the negligence charge and the jury's finding of no negligence.

POINT I

The Lower Court Properly Charged That If Plaintiff And The Stevedore Knew Of The Dangerous Condition Or It Was So Obvious That It Should Have Been Observed, Then Owners Owed No Duty To Warn Of The Open Condition And Thus Would Not Be Negligent.

The Lower Court properly charged that if plaintiff and the stevedore knew of the dangerous condition or it was so obvious that it should have been observed, then owners owed no duty to warn of the open condition and thus would not be negligent.

The full charge of the Court on this point is set forth and is coupled with the charge previously given with respect to negligence.

> ". . . if you find that the condition complained of by the plaintiff, that is permitting snow to accumulate under the plywood which caused the plywood to slip out from under him was known to the stevedore or to any of its employees, including the plaintiff, or if this condition was so open and obvious that it should have been observed, then the ship owner owes no responsibility to warn a longshoreman of the open condition. If you find such then you can not find that the defendant was negligent and you must return a verdict for the defendant. On the other hand, if you do not so find then you should consider the question of whether the defendant was negligent and if you find the defendant negligent you must return a verdict for the plaintiff." (167a-168a).

Concepts of maritime negligence have been replaced by a new cause of action for negligence in which a shipowner is not to be held liable as a third party unless the former's negligence was such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

Congress intended that the legal questions which may arise under the Act shall be determined as a matter of Federal Law.

> Senate Committee Report No. 92-1125;
> House Committee Report No. 92-1441.

The Courts have followed the direction of Congress.

> *Hite* v. *Maritime Overseas Corporation,* 380 F. Supp. 222 (E.D. Tex., Beaumont Div.);
> *Ramirez* v. *Toko Kaiun K.K.,* 385 F.Supp. 644, 653 (N.D. Cal. 1974);

Bess v. *Agromar,* 518 F.2d 738 (4 CCA 1975);
Anuszewski v. *Dynamic Mariners Corp. Panama,* 391 F.Supp. 1143 (1146);
Lucas v. *Brinknes Schiffahrts Ges.,* 379 F.Supp. 759 (E.D. Pa. 1974), appeal dismissed, No. 75-1223 (3rd Cir.) April 30, 1975 pet. for cert. filed, 44 U.S.L.W. 3054 (U.S. July 14, 1975).

The Act abolishes the concept that the vessel owes plaintiff a non-delegable duty to furnish plaintiff with a safe place to work, a specie of unseaworthiness, 33 U.S.C. 905 (b), and the cases so hold.

Bess v. *Agromar Line, supra;*
Ramirez v. *Toko Kaiun K.K., supra;*
Hite v. *Maritime Overseas Corporation, supra;*
Frasca v. *Prudential-Grace Lines, Inc., supra;*
Lucas v. *Brinknes Schiffahrts, supra.*

One clause of Section 905(b) of the Act insulates owners from liability to plaintiff. That clause prohibits an action for negligence. It provides:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . ."

Here, the plaintiff, his employers and the stevedore were employed by the vessel to provide stevedoring services. The Lower Court's charge was in compliance with Section 905(b). It goes to the issue of the negligence of those persons.

Plaintiff does not contend that there was no evidence of negligence on the part of plaintiff, his co-workers or the stevedore. Plaintiff's argument relates to the charge.

There is evidence of negligence and, implicity, the jury so found. The stevedore had supervision, direction and control of its employees, the place of work and the method of performance of the work.

Plaintiff, the hatch boss, and the winchman knew it was snowing. The jury could have believed the hatch boss that the plaintiff put the plywood over the top of the metal drums and created his place of work or the jury could have believed the winchman that "we put the plywood on top of the drums as a walking place for plaintiff to carry out his job as signalman." The jury could have believed that the hatch boss and the plaintiff failed to secure the plywood so that it would not slip. The jury could have found that the hatch boss did not require plaintiff to work at two alternate safe places of work; one, in the open space between the after house and the aft end of No. 5 hatch—the aft end of the stowage of drums extending to the ship's rail, and; two, at the inshore rail on the after house.

As part and parcel of plaintiff's argument, the plaintiff contends that the Court erred in charging the jury that if the condition was so open and obvious that it should have been observed, then the shipowner has no responsibility to warn.

The situation of the shipowner is comparable to that of a landowner or occupier of premises who contracts with an independent contractor to perform services on the premises.

There is support for the Court's charge:

Hite v. *Maritime Overseas Corporation, supra* and the voluminous cases cited in footnote 9;

Fitzgerald v. *Compania Naviera La Molinera,* 394 F.Supp. 413 (D.C.E.D. La. Feb. 1975);

Ramirez v. *Toko Kaiun K.K., supra;*

Frasca v. *Prudential-Grace Lines, Inc.,* 394 F.Supp. 1092 (1915);

Restatement (*Second*) *Torts,* Sec. 343A, comments e.f. at 219-20 (1965).

Two unreported charges in the Southern District of New York support Judge Ward's charge.

Judge Pollack in *Clavejo* v. *H. Schuldt Hamburg West Germany* (S.D.N.Y. 73 Civ. 4393), unreported, charged the jury as follows:

> "If you were to find that the racks were those of the ship, the shipowner is under no duty to warn the stevedore's employee of dangers or open and obvious defects which are known to the stevedore's employee or which could be readily observed by him in the exercise of ordinary care.
>
> "Now, if you find that the danger complained of by the plaintiff, Raphael Clavejo, which has been described as a defect in the floor rack that was used underneath the booster, accordng to him, which is part of the conveyor system, was known to the plaintiff, Raphael Clavejo, or if the danger was so open and obvious that it should have been observed by him in the exercise of ordinary care for his own safety, then the vessel owes no responsibility to warn the longshoreman of the condition of the rack."

Judge MacMahon in *Scotto* v. *South African Marine Corp., Ltd.* (S.D.N.Y. 74 Civ. 495), unreported, charged the jury on October 10, 1974 as follows:

> "If you find that the condition complained of by the plaintiff Scotto which has been described as an oil spill was known to the stevedore, or to any of its employees including Scotto, or if said condition was so open and obvious that it should have been observed, then the vessel owes no responsibility to warn the longshoreman of the open condition. If you find such, then you cannot find that the defendant was negligent, and you must return a verdict for the defendant.
>
> "The shipowner is under no duty to warn the stevedore or its employees of dangers or open and obvious de-

fects which are known to the stevedore or which can be readily observed by them in the exercise of ordinary care."

It is submitted that the exception of plaintiff to Judge Ward's charges is not well taken.

POINT II

The Court Properly Refused To Charge That Concurrent Negligence Of Shipowner And Stevedore-Employer Does Not Relieve The Shipowner From Liability.

The Court properly refused to charge that concurrent negligence of shipowner and stevedore-employer does not relieve the shipowner from liability.

In support of the assigned error the plaintiff relies upon *Landon* v. *Leif Hoegh & Co.* (2 CCA June 18, 1975) No. 590—September Term, 1974, Docket No. 74-2304) 1975 AMC 1106.

That case holds that under the Act the shipowner may not sue the stevedore's insurance carrier for the stevedore's concurrent negligence, nor is the plaintiff longshoreman's recovery against the shipowner dependent on proof that the shipowner was solely responsible for his injury without any negligence of the stevedore.

In the case at bar, the shipowner makes no claim against any third party, nor does it assert its liability is dependent upon proof that it was solely responsible for plaintiff's injury without any negligence of the stevedore.

The shipowner was its own stevedore and the employer of the plaintiff. It contends that under Section 905(b) of the Act, *supra,* it is not liable for the negligence of the stevedore or its employees. The Act expressly provides that plaintiff has no action for negligence. Concurrent

negligence cannot be predicated on no liability, a no cause of action for negligence. It is submitted that it has been demonstrated that the jury found that the stevedore and its employees were negligent and that the shipowner was not liable for their negligence. Thus, plaintiff has no cause of action for negligence and there is no issue of concurrent negligence.

Before the amendment to the Act, the bareboat charterer, owner pro hac vice, who acted as its stevedore, was liable to its longshore employer for unseaworthiness. The amendment did not change the law, except to predicate liability on negligence so as to hold the shipowner up to a standard of care upon the assumption that shipowners would thus exercise care to prevent accidents.

Griffith v. *Wheeling Pittsburgh Steel Corporation,* 521 F.2d 31 (3 CCA Aug. 1975)

The contention that the jury was confused and misled as to the proof necessary to make a case of liability on the part of the shipowner for negligence is without merit.

CONCLUSION

The judgment below should be affirmed in all respects.

Respectfully submitted,

ZOCK, PETRIE, REID, CURTIN & BYRNES
Attorneys for Defendant-Appellee

EDWIN K. REID
of Counsel

(59322)

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State of New York,
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City of New York—ss.:

IRVING LIGHTMAN , being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of January , 1976, he served two copies of Appellee's Brief on Zimmerman & Zimmerman, Esqs. , the attorneys for Appellant by delivering to and leaving same with a proper person in charge of their office at 160 Broadway in the Borough of Manhattan , City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
26th day of January , 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976